

Newsletter

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Why comparing with others can be a good thing

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BERLIN ART LIBRARY

In the first Newsletter, published by the Network of European Restitution Committees on Nazi-Looted Art, the Chairman of the CIVS - the Restitution Committee in France - wrote: "The study of a case [...] can [...] enrich our reflections and question our practices."¹ This holds even truer for a case which was the subject of multiple decisions issued by different national bodies, such as the one about Curt Glaser.² A comparative study will not only address the facts of the case - especially the circumstances of loss - but also, and foremost, the way each restitution system

has reached its decision. In particular, comparison will offer a unique opportunity to look at the normative considerations underlying each decision in order to find a just and fair solution. This article will illustrate similarities and differences in the decision-making-process of different national bodies dealing with the *causa Glaser*, the effects pluralistic approaches have on international restitution practices today and why comparing with others can be a starting point for dealing with future cases in a more coherent, predictable and comprehensible way.



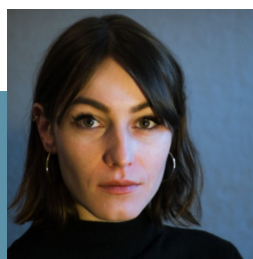
In an exchange of letters, he describes his changed life situation, stating, that his whole world had collapsed due to the loss of his wife, his job, and his apartment and that he got rid of all his possessions to start a new life with a woman, Marie, whom Glaser marries shortly after

Prof. Curt Glaser, the son of a Jewish family, was considered one of the leading chroniclers, critics and publicists in Berlin art life in the 1920s.³ The Director of the Berlin Art Library which was located in a prestigious building on Prinz-Albrecht-Strasse lived in an official apartment in the same building complex. Through his museum activities and the support of his wife Elsa, he increasingly established himself as a collector and patron of modern art. One of his close confidants was the painter Edvard Munch.⁴ Next to art works by Munch, the Glaser Collection included works by van Gogh, Matisse and Picasso. Elsa, who was a stimulator in art and philosophy herself, hosted so called *Monday Salons* in their apartment - a gathering of the Berlin art and cultural scene. While Curt Glaser was celebrating great professional success, he was struck by a stroke of fate in 1932 with the sudden death of Elsa. Shortly after, his situation worsened in professional terms. In April 1933, the National Socialists enacted a law, which empowered the regime to remove Jewish servants from the civil service.⁵

Glaser was suspended from his position at the Art Library and his official apartment was confiscated by the Gestapo. During this time, Glaser maintained close contact with Munch. In an exchange of letters, he describes his changed life situation, stating, that his whole world had collapsed due to the loss of his

wife, his job, and his apartment and that he got rid of all his possessions to start a new life with a woman, Marie, whom Glaser marries shortly after.⁶ The letter coincides with two auctions in Berlin in May 1933 at which Glaser is selling most of his art collection.⁷ After the collection was dissolved, Curt Glaser and his second wife left Germany and emigrated first to Switzerland and in 1941 to New York where he died two years later.

Following the two auctions in 1933, Glaser's collection entered the international art market ending up in public and private collections in Europe and the US. In the late 1990s, the surviving heirs started to claim the return of a large number of the art, stating that in view of the persecution by the Nazis, Glaser had no choice but to sell his collection. The sales were involuntary and therefore *forced*. Since 2007, a large number of decisions on the Glaser Collection have been issued by various German museums, a Dutch museum, a gallery in England and the Art Museum in Basel.⁸



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This statutory presumption eases the burden of proof for the claimants. Now the institution is obliged to prove that the transaction cannot be considered a forced sale by showing that the seller received a fair purchase price and that he or she was free to dispose of the purchase price as desired.

All these decisions were made on the basis of the *Washington Principles*, adopted in 1998 and signed by 44 governments. Art that has been confiscated by the Nazis is identified in the course of Provenance Research and in cases where such confiscation is established, *just and fair solutions* should be sought between the parties involved.⁹ In contrast to courts, which decide on the question of ownership in a binary manner and on the basis of statutory provisions¹⁰, the conceptual approach of the *Washington Principles* opens up a wide scope for the assessment of restitution claims. In view of the cultural, historical and legal differences existing between the signatories, each system developed its own approach to find just and fair solutions in the context of Nazi-looted art.

In dealing with *forced sales*¹¹, the different approaches could be divided roughly into two categories.¹² On the one hand, there are the restitution practices in Germany and the Netherlands, operating with *statutory presumptions*. On the other hand there are the approaches in England and - at least in the Glaser case¹³ - in Switzerland, which could be described as an *overall assessment* of the claim.

a. Germany and the Netherlands

Public institutions¹⁴ as well as the Restitution Committee in Germany operate on the basis of the *Guidelines*¹⁵ which provide a form of

evaluation program for assessing claims. The first step is to examine whether the claimants were subject to persecution in the period between January 1933 and May 1945, which is assumed if the seller was of Jewish origin. In a second step the type of loss is determined. In the case of assets lost as the result of a legal transaction during the period of persecution it is *presumed* that these losses are forced sales. This *statutory presumption* eases the burden of proof for the claimants. Now the institution is obliged to prove that the transaction *cannot* be considered a forced sale by showing that the *seller received a fair purchase price* and that *he or she was free to dispose of the purchase price as desired*. The Dutch Restitutiecommissie has a similar approach when evaluating forced sales. The *3rd recommendation of the Ekkart Committee (2001)*¹⁶ provides for a statutory presumption for forced sales if the vendor is of Jewish origin, which can be rebutted by *express evidence to the contrary*. In light of the statutory presumptions, the decision-makers in Germany and the Netherlands recognised the sale of Glaser's collection as a forced sale. Neither the German institutions nor the Dutch Restitutiecommissie found evidence which would rebut the presumptions.¹⁷ As a result, all institutions either returned the artworks to the heirs or paid compensation.

b. United Kingdom and Switzerland

Unlike in the aforementioned legal systems



Treating each case in isolation risks resulting in potentially unjustifiable inconsistencies of outcomes in identical cases, which call into question the legitimacy of each individual decision.

there is no statutory presumption for forced sales in British or Swiss restitution practices¹⁸. The Spoliation Advisory Panel in the United Kingdom (SAP) and the Art Commission Basel rather took an *overall assessment* of the claims brought by the Glaser heirs, taking into account all those criteria the deciding authorities considered to be relevant.

At the center of the assessment are the circumstances by which the original owner lost possession of the cultural object. Therefore both panels evaluated Glaser's motives to sell his collection in 1933 and - aside from persecution measures - considered personal reasons of the collector. The SAP elaborated, that the stroke of fate Glaser had suffered through the death of his wife and its effects, which are expressed in the letter to Munch, would demonstrate that he *was also looking forward to starting a new life and, to that extent, his release from previous responsibilities was not unwelcome*¹⁹. In light of these *mixed motives* the SAP identified the *extent* to which the sale was attributed to Nazi oppression. Similar considerations can be found in the decision of the Art Commission Basel which pointed out, that the *extent of coercion in the case of Curt Glaser was less than in other cases*.²⁰ Nevertheless, both committees concluded, that the sale was predominantly motivated by persecution and thus forced. But - as the SAP states in its report - the evaluation of the claim has to include *all relevant factors* and not merely causation: Glaser had received a *purchase price*, which in view of the British Panel was fair; he could *freely dispose* of the proceeds

from the auction, his heirs had been *compensated* by the German government in the postwar period, and the institutions could not be accused of any wrongdoing²¹. After all, the committees decided that restitution would not constitute a just and fair solution in the Glaser case. Instead, the SAP recommended the display of a brief account of the object's history and provenance alongside the object, while in the Swiss Art Commissions view, the payment of compensation would do justice to the conflicting interests of the parties.

As has been shown, a decision under the just-and-fair rule of the Washington Principles can reflect a full range of possible solutions. What is *just and fair* is determined in view of the facts of each case by each decision-maker on the basis of diverging assessment frameworks. While recognising an interest in predictable and comprehensible decision-making-processes, this pluralistic approach can be viewed critically.²² Treating each case in isolation risks resulting in potentially unjustifiable inconsistencies of outcomes in identical cases, which call into question the legitimacy of each individual decision.²³ For the claimants, it seems to depend merely on chance in which country the claimed object is located and according to which criteria the national bodies decide. For the decision-makers, in turn, there is no possibility for orientation towards a binding restitution practice.

With a growing number of cases, however, recurring types of losses emerge. As their core elements are identical, they raise similar



WINTER LANDSCAPE
BY JAN VAN DE VELDE II

questions when assessing the claims. Based on these questions and the subsequent considerations the deciding bodies took into account when assessing previous cases, an abstract set of criteria can be developed from practice. Such a set does not constitute a valid statement about what *should* be considered just and fair. However, if the same criteria are applied by a number of decision-makers, this finding is to be taken as an indicator what just and fair solutions could be, subject to further discussion and deliberation.

The Glaser case exemplifies, that there are indeed criteria that has been applied in various decisions to determine whether the sale was a forced sale. Since the concept of a forced sale is used as a typology for losses due to the Nazi regime, the involuntary nature of the loss must be attributable to it. As the

aforementioned decisions show, the criteria establishing this causal link is the persecution of the original owner. On the other hand, all decision-makers assessed factors, that could speak against a forced sale, such as the fairness of the purchase price and the free availability of the proceeds. These similarities provide a starting point to formulate abstract criteria.

But what to do with factors that were taken into consideration only in some jurisdictions but not in others? In the Glaser case, one of the more apparent differences is the acknowledgment of personal motives. In Germany and the Netherlands, a forced sale is presumed (subject to narrow grounds for rebuttal by the holder) if the vendor was part of a persecuted group. Whether the decision to sell was additionally influenced by personal motives thus



remains irrelevant. Within such a framework, a forced sale comes close to an either-or-decision based upon persecution.

The British Panel, on the other hand, does assess all motives behind a sale and in cases of *mixed motives* identifies the *extent* to which the vendor's decision can be attributed to Nazi persecution. In the Glaser case the Panel concluded that persecution was the predominant motive and the sale therefore forced. But what would happen in a hypothetical case where the decision to sell stems from mixed motives but is not primarily based on persecution. A loss through a forced sale could be rejected, even though the original owner was persecuted. While developing an abstract set of criteria these differences in approaches lead to more general questions: Is the intensity of persecution the original

owners and their families had to sustain a consideration within the framework of a just and fair solution? In other words, how persecuted must the vendors have been that the transaction can be qualified as a forced sale? And do such considerations - as a counterweight - relativize the injustice suffered by those affected? The answers to these questions also depend on the understanding each restitution system has, as to which legal and moral obligations arise from the Washington Principles and how they should be reflected in the assessment of claims. Exploring these understandings by looking at previous decisions and developing a common frame of reference can help to overcome the obstacles, the claimants as well as the Committees are confronted with. This is why comparing with others might indeed be a good thing.

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- 1 Michel Jeannotot, Network of European Restitution Committees On Nazi-Looted Art, Newsletter No. 1, March 2019, p. 1, online available at <https://www.restitutiecommissie.nl/en/system/files/Network-Newsletter-no.1-March2019.pdf> (accessed 3.6.2021).
 - 2 Cases which were subject of restitution proceedings in various jurisdictions do not occur infrequently. Reference can be made to the collections of Max Silberberg, Max Stern, Emma Budge, Heinrich Rothberger or Rosa and Jakob Oppenheimer.
 - 3 Joachim Brand / Hein-Thomas Schulze Altcapenberg, Curt Glaser und die Staatlichen Museen zu Berlin, in: Jahrbuch Preussischer Kulturbesitz 2012, Bd. XLVIII, Hermann Parzinger (ed.) Berlin, 2014, p. 375.
 - 4 See generally Art Commission Basel, Decision of the Kunstkommission in the matter of Curt Glaser, 2018, p. 109 et seq., online available at <https://kunstmuseumbasel.ch/de/forschung/provenienzforschung/curtglaser> (accessed 3.6.2021).
 - 5 Gesetz zur Wiederherstellung des Berufsbeamten-tums (Law for the Restoration of the Professional Civil Service), RGBl. I, 7.4.1933, p. 175-177.
 - 6 Letter from Curt Glaser to Edvard Munch, 19.5.1933, Munchmuseet MM K 2387, available at https://www.emunch.no/HYBRIDNo-MM_K2387.xhtml (accessed 3.6.2021).
 - 7 The first auction took place on May 9, 1933, at the Internationale Kunst- und Auktions-Haus GmbH in Berlin, the second auction at the Berlin antiquarian Max Perl on May 18 and 19, 1933.
 - 8 For an overview of the decisions about the Glaser collection (until 2018), see Art Commission Basel (Fn. 4), p. 138 et seq. The decision of the Museum of Fine Arts in Boston, USA, which rejected restitution will not be considered, as the decision-makers explicitly referred to the Report of the UK Spoliation Advisory Panel. See publication on the website of the Museum of Fine Arts Boston, available at <https://collectionp.mfa.org/objects/33583> (accessed 3.6.2021).
 - 9 No. 8 of the Washington Conference Principles on Nazi-Confiscated Art, available at <https://www.lootedartcommission.com/Washington-principles> (accessed 3.6.2021).



- 10 Legal proceedings are somewhat of a flawed medium in the context of Nazi-looted art. Claims are statute-barred under the applicable limitation periods or might fail because the current holders have acquired ownership in good faith. Evidentiary difficulties due to the passage of time cannot be addressed adequately in legal proceedings, which should be taken into account according to No. 4 of the Washington Principles.
- 11 To date, there is no common definition of a „forced sale“ in the context of Nazi-looted art. The lack of consensus on definitions has been criticised before, see for example Anne Webber, Co-Chair of the Commission for Looted Art in Europe (CLEA), “70 years and counting: The final opportunity?”, Note of Proceedings, National Gallery, London, 12.9.2017, para 24; available at <https://www.gov.uk/government/groups/spoliation-advisory-panel#spoliation-conference-2017---70-years-and-counting-the-final-opportunity--note-of-proceedings> (accessed 3.6.2021).
- 12 This categorization serves to illustrate essential differences in restitution practices dealing with forced sales and is not intended to level out nuances within the individual systems.
- 13 Swiss restitution practice is organised in a decentralised manner. Decisions on restitution or compensation are predominantly made at the discretion of the (public) institutions, especially museums and collections, or their legal owners in each canton. A commission to solve disputed ownership issues in the context of Nazi-looted art has not been established. The decision in the Glaser case can therefore only represent one approach within the overall restitution system in Switzerland.
- 14 Similar to Switzerland, German restitution practice is organised in a decentralised manner. Decisions are mainly made by the individual institutions or their legal owners.
- 15 Handreichung zur Umsetzung der „Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz“, current version 2019, available at <https://www.kulturgutverluste.de/Webs/EN/Research/Guidelines/Index.html?jsessionid=903262D8270038A9D-1686F1ACF8980F6.m1> (accessed 3.6.2021).
- 16 3rd Recommendation of the Ekkart Commission, 26.4.2001, available at https://www.restitutiecommissie.nl/en/policy_framework_regarding_the_national_art_collection.html (accessed 3.6.2021).
- 17 The Dutch Restitutiecommissie had no evidence of the amount of the purchase price received. The Committee considered it likely that Glaser could not freely dispose of the proceeds, but probably had to use them to finance his escape to the United States and to pay the exit taxes imposed by the Nazis, see Recommendation of the Restitutiecommissie, 4.10.2010, No. 1.99, para. 9, available at https://www.restitutiecommissie.nl/en/recommendations/recommendation_199.html (accessed 3.6.2021).
- 18 In assessing whether the object was lost through a forced sale, the Art Commission Basel makes reference to the German Guidelines. However, the statutory presumption is not applied, since an indiscriminate adoption of the Guidelines for Switzerland would be doubtful, see Art Commission Basel (Fn. 5), p. 150.
- 19 Report of the Spoliation Advisory Panel, HC 757, 24.6.2009, para 35, available at: https://assetpublishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/248231/0757.pdf (accessed 3.6.2021). It should be mentioned that the Art Commission Basel assessed Glaser’s personal motives also referring to the notion of “mixed motives” from the SAP report. However, due to the clear presence of persecution, it were irrelevant whether the decision to sell might also be based on other motives since these possibilities did not form a solid basis for explaining the sale, Art Commission Basel (Fn. 5), p. 154 et seq.
- 20 Art Commission Basel (Fn. 5), p. 156. (if Fn. 5 is erased, the source would have to be mentioned here).
- 21 The same considerations can be found in the decision of the Art Commission Basel which additionally assessed various ancillary criteria, see Art Commission Basel (Fn. 5), p. 158 ff.
- 22 See generally Charlotte Woodhead, Action towards consistent „just and fair solutions“, in: Guide to the work of the Restitution Committees - Five ways of resolving claims, 2019, pp. 65-75.
- 23 See generally Matthias Weller, In search of „just and fair“ solutions: Towards the future of the Washington Principles on Nazi-confiscated Art“, in: Guide to the work of the Restitution Committees - Five ways of resolving claims, 2019, pp. 9-17.

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